Editor's note: 94 I.D. 429; Reconsideration granted, decision affirmed -- See 102 IBLA 363 (June 10, 1988); Appealed -- dismissed for lack of jurisdiction,(remanded to BLM for proceedings in conformity with IBLA decision); sub nom. American Colloid Co. v. Hodel, Civ.No. 88-0224-J (D.Wyo. Dec. 22, 1988), 701 F.Supp. 1537.

SCOTT BURNHAM

IBLA 85-264 Decided December 2, 1987

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, dismissing protest of mineral patent application (W-80886) and declaring mining claims null and void (WMC-225789 through WMC-225806).

Reversed and remanded.

1. Applications and Entries: Generally -- Mining Claims: Lands Subject to -- Segregation

   A mineral patent application does not segregate land from the acquisition of competing rights.

2. Contests and Protests: Generally -- Evidence: Presumptions -- Rules of Practice: Generally -- Statutes

   The assumption required by 30 U.S.C. § 29 (1982) "that no adverse claim exists" does not apply to claims which did not exist at the time of publication of notice of a patent application and for which no adverse claim could have been filed.

3. Contests and Protests: Generally -- Evidence: Presumptions -- Rules of Practice: Generally -- Statutes

   The assumption "that no adverse claim exists" required by 30 U.S.C. § 29 (1982) operates as a presumption that the patent applicant holds superior possessory title so that the Department may proceed to determine the

question of whether his mining claim is valid under the mining laws. If the Department determines that the applicant's claim is valid and issues a patent, a rival claim becomes a nullity because there is no longer any Federal land to which it can attach as a location under the mining laws. If the patent application is rejected, matters are restored to where they stood prior to the application, and a rival locator may adverse a second application for land or apply for a patent himself.

4. Contests and Protests: Generally -- Rules of Practice: Protests

A locator who fails to file an adverse claim against an application for patent may file a protest on the grounds that the applicant has failed to comply with the mining laws. 5. Administrative Procedure: Standing -- Rules of Practice: Appeals: Standing to Appeal

5. Administrative Proceedure: Standing -- Rules of Practice: Appeals: Standing to Appeal

Under 43 CFR 4.410(a) there are two separate and distinct prerequisites to prosecution of an appeal to the Board of Land Appeals: (1) the appellant must be a "party to the case," and (2) the appellant must be "adversely affected" by the decision below.

6. Administrative Procedure: Standing -- Rules of Practice: Appeals: Standing to Appeal

The assumption "that no adverse claim exists" required by 30 U.S.C. § 29 (1982) does not extend to preclude a mining claim for which no adverse claim was filed during publication of notice of patent proceedings from serving as a foundation for finding standing to appeal.

7. Applications and Entries: Generally -- Mining Claims: Generally -- Mining Claims: Determination of Validity -- Mining Claims: Patent

The issue of the validity of a mining claim is the ultimate concern of the Department when a patent application has been made, and the Department necessarily has the power to inquire into and determine whether the location is valid under both Federal and state law.

8. Applications and Entries: Generally -- Courts -- Contests and and Protests: Generally -- Mining Claims: Generally -- Mining Claims: Contests -- Mining Claims: Determination of Validity -- Mining Claims: Litigation -- State Courts

A judgment rendered in adverse proceedings is not conclusive as to matters which might have been decided, but only as to matters which were in fact decided. Unlike litigation over title to real property, the judgment in a judicial proceeding between locators determines superiority of possessory title. Unless mandated by the terms of the judgment, there may be no reason to conclude that, in reaching its judgment, the court made a finding of fact argued for by a party when offering evidence.

9. Applications and Entries: Generally -- Courts -- Contests and Protests: Generally -- Mining Claims: Generally -- Mining Claims: Contests -- Mining Claims: Determination of Validity -- Mining Claims: Litigation -- State Courts

The effect attributed to a judgment issued in adverse proceedings must rest upon the judicial authority of the court in resolving conflicts as to facts and making rulings upon applicable law. Although a settlement reached by the parties must be reviewed and approved by the court, if it approves, there is no need to decide the factual and legal issues on which it otherwise would have based its decision. For this reason, factual and legal conclusions stated in a settlement to which the United States is not a party cannot be binding upon the Department.

10. Mining Claims: Generally -- Mining Claims: Determination of Validity -- Mining Claims: Location -- Words and Phrases

"Good faith." Good faith in the location of mining claims is widely recognized as an implicit requirement of the mining laws. When a question of good faith concerns a locator's knowledge of prior claims and his purposes in locating rival claims, the issue is appropriately left to resolution by judicial proceedings between the locators. However, "good faith" may also concern a locator's knowledge and purposes in attempting to obtain rights to Federal lands by establishing mining claims.

APPEARANCES: William N. Heiss, Esq., Casper, Wyoming, for appellant; Arthur H. Nielsen, Esq., Jonathan L. Reid, Esq., Thomas C. Jepperson, Esq., Salt Lake City, Utah, for American Colloid; Lyle K. Rising, Esq., Office of the Solicitor, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Scott Burnham has appealed a decision of the Wyoming State Office, Bureau of Land Management (BLM), dated December 12, 1984, which dismissed a protest filed by him and declared the Foxx Nos. 1 through 18 placer mining claims null and void ab initio. Appellant's Foxx claims were located December 11, 1983, recorded with Big Horn County, Wyoming, December 13, 1983, and filed with BLM December 29, 1983. They are within secs. 3, 4, and 5 of T. 57 N., R. 96 W., sixth principal meridian, Big Horn County, Wyoming. Appellant's protest was filed February 16, 1984, against a patent application made by American Colloid Company for the Sho Nos. 4, 5, and 16 placer claims (W-80886). The Foxx No. 18 and the Sho No. 4 both occupy approximately the north half of lot 5, sec. 5, T. 57 N., R. 96 W., sixth principal meridian.

I.

This case plays a part in a drama for which the stage was set by the partial revocation of a withdrawal of land which had been in effect since 1903 under authority of the Reclamation Act of 1902, ch. 1093, 32 Stat. 388

(codified in various portions of 43 U.S.C. §§ 371-498 (1982)). By notice published in the Federal Register, BLM announced that 2,367.16 acres of land in the Shoshone Reclamation Project in Big Horn County, Wyoming, were to be restored to operation of the public land laws. 46 FR 46134 (Sept. 17, 1981). The notice stated in part that "[a]t 10 a.m. on October 10, 1981, the lands will be open to location under the United States mining laws." Id.

On the morning the area was opened, a number of locators were present on the land and located blocks of mining claims. It appears that American Colloid located 92 mining claims, blanketing most of the restored area. By application received by BLM June 22, 1982, the company sought patent for seven of its claims. During the period of publication of notice of the patent application, other parties who had located claims on the morning of October 10 filed adverse claims as required to preserve their rights. See 30 U.S.C. §§ 29, 30 (1982); 43 CFR Subpart 3871. BLM advised each of the adverse claimants that they were required to commence proceedings in a court of competent jurisdiction. Information in the case file suggests that at least some of the land encompassed by American Colloid's seven claims was already subject to a patent application filed by Carl E. Fischer et al. (W-78411) which had been adversed (contested) by American Colloid along with others, with judicial proceedings pending in the U.S. District Court for the District of Wyoming. Although the procedural mechanism is not revealed by the case file, the adverse claims filed against American Colloid's patent application were consolidated with the pending litigation to the Fischer group application. The outcome of the litigation was that notices of

abandonment of mining claims were filed with BLM by various parties, and on September 9, 1983, Judge Brimmer issued a final order of dismissal pursuant to stipulations made among the parties.

By letter dated August 1, 1983, American Colloid withdrew four claims from its patent application. On March 7, 1984, the company made payment to BLM for the three remaining claims and was issued a receipt. Scott Burnham, appellant herein, filed a location notice for his Foxx No. 18 claim in December 1983, covering the lands embraced by American Colloid's Sho #4 claim. Appellant filed a protest against American Colloid's patent application on February 16, 1984.

Appellant's protest did not assert that American Colloid's claims were improperly located or void, though clearly this was its purpose. Rather, Burnham provided three reasons for his protest, each of which indicated that the claims had been improperly located: (1) The testimony of Myron Durtsche, Jr., as to the manner of the location of the Sho No. 4 as contained in a deposition submitted with the protest; (2) the statement in BLM Instruction Memorandum (IM) No. 83-241 that "[a]ppropriations of lands under the general mining laws prior to the date and time of restoration is unauthorized"; and (3) legal briefs submitted with the protest, addressing "the adoption issue," which "were written in regard to another lawsuit, but the same issue applies." The briefs are captioned as being "In Support of Joint Motion for Summary Judgment Against Plaintiff, American Colloid Company, by Defendants Fischer Association, Sage Creek Minerals, Blue Wash Company, Wilson Group, and Davis

Group" and were filed in Federal district court as part of the litigation of the adverse claims. The deposition of Durtsche was taken as part of the same litigation. 1/

The documents submitted by Burnham with his protest indicate that American Colloid went onto the land sometime prior to the withdrawal revocation and positioned at regular intervals throughout the area unmarked 4x4 wood posts as "survey markers." American Colloid later "adopted" these "survey markers" as corner posts for alternate rows of claims. For the other claims located by the company, it seems that there were sufficient personnel on the land on October 10, 1981, to post location notices and additional 4x4 posts at approximately 10 a.m. These posts were painted and numbered and had iron rods placed in their bases for quick insertion into the ground. They were placed next to the unpainted "survey markers" to serve as corner monuments for the adjoining claims. If carried out as planned, no claim would have both unpainted "survey markers" and painted corner posts as corner monuments, and alternate rows of claims would have either adopted "survey markers" or painted corner posts.

The documents submitted by Burnham also indicate that prior to the revocation of the withdrawal, American Colloid took drilling equipment onto the land and drilled a number of exploratory test holes for the purpose of disclosing mineral deposits. The company's mining claims were located for

1/ The copy of the deposition contained in the record before the Board is labeled Volume II and begins with page 124.

bentonite. The record suggests that numerous exposures of bentonite were readily visible within the area. The drilling was apparently conducted on planned locations, indicated by "survey markers," which did not contain exposures of mineral.

By letter dated July 18, 1984, BLM acknowledged receipt of appellant's protest, stating that due to questions raised by the protest and by BLM's review of the patent application file, the agency was requesting advice from the Regional Solicitor. BLM's decision dismissing appellant's protest recited that advice from the Regional Solicitor had been obtained and enclosed a copy of a Solicitor's memorandum addressing the matter. Following the Solicitor's advice, BLM rejected appellant's protest, stating in relevant part as to each of appellant's reasons:

> [1.] * * * [T]he issue of prestaking and adoption goes entirely to the issue of possession and good faith. Any locator who places stakes or other monuments on withdrawn lands assumes the risk that good faith location will be addressed and possibly resolved against him in an adverse proceeding to determine possession. Such a proceeding was initiated in this case, and because the issue of prestaking and adoption was raised in the proceedings, we must conclude that the parties took that issue into consideration in reaching their settlement. To that end, the sworn testimony as to the prestaking and adoption issue, as well as the implications and inferences, have been determined to have been disposed of by virtue of Judge Brimmer's decision of September 9, 1983.
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> * * * * * * *
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> [2.] * * * [IM No. 83-241] clearly states that rights to possession shall be decided between the parties by State or Federal Courts applying State law and the Bureau of Land Management will not intervene. In essence, this memorandum, issued after the Opening Order in this case, requires that Opening Orders inform people what the law is regarding location and possession of mining claims. We cannot agree that it supports your position.

> [3.] * * * Our review * * * revealed that these briefs were indeed included in the adverse claim consolidated cases involving mineral patent application, W-80886; consequently, we conclude they were considered in the negotiated settlement between the parties and in Judge Brimmer's Decision.

BLM's decision also stated that a review of both the documents submitted with appellant's protest and the case file for W-80886 had disclosed "no additional evidence apart from that considered by the Court, and specifically, no evidence that the applicant has not complied with the requirements of the law for obtaining a patent" (Decision at 3). Accordingly, BLM dismissed appellant's protest "based on the September 9, 1983 Decision of the Court, and for failure to show that the applicant has not complied with the requirements of the law for obtaining a patent." Id. Finally, BLM found appellant's Foxx mining claims to be null and void ab initio for lack of title "by virtue of being located on lands segregated from entry by virtue of a mineral patent application." Id. at 4.

In his statement of reasons, appellant renews the basic assertion of his protest that acts of location performed on land which has been withdrawn from the location of mining claims may not be "adopted" after the withdrawal has been revoked as acts essential to the location of a valid mining claim (Statement of Reasons at 8). This assertion concerns primarily the "survey monuments" established by American Colloid prior to the revocation of the withdrawal, but also concerns the exploratory drilling conducted prior to the revocation of the withdrawal.

While the issue appellant raises is relevant, it is not the issue directly raised by the actions taken in the BLM decision which is the subject

of our review. BLM's decision dismissed appellant's protest because, as proposed by the Solicitor's memorandum enclosed with the decision, BLM found the issue of prestaking to concern only the good faith and possessory rights of a locator and to be a matter for judicial determination in proceedings between rival locators. Because BLM also found the issue of prestaking had been considered and disposed of by the litigation of the adverse claims, it concluded that the Durtsche deposition and legal briefs submitted with Burnham's protest were not subject to its consideration and dismissed appellant's protest for failure to present "evidence that the applicant has not complied with the requirements of the law for obtaining a patent" (Decision at 3). In addition, BLM declared appellant's mining claims to be null and void ab initio because they were located on land segregated from the location of mining claims by American Colloid's patent application. The correctness of these determinations are the immediate subject of this appeal.

American Colloid has entered an appearance to respond to appellant's arguments. It asserts that its manner of locating its claims by adoption of "survey markers" as corner posts was legally proper. In addition, the company argues that Burnham lacks standing to appeal the dismissal of his protest. Appellant has replied by arguing that his mining claims give him sufficient interest to have standing to appeal. The Office of the Solicitor has appeared on behalf of BLM, asserting, as in its memorandum to BLM, that the issue of prestaking and adoption is primarily an issue of good faith and is a matter for determination by state courts.

In the proper course of review, prior to addressing the substantive issues raised by the appeal of BLM's decision, we should consider American Colloid's contention that appellant lacks standing to appeal. However, in this case, the issue of standing is not independent of the other issues raised by the appeal. American Colloid contends that Burnham lacks standing because he has no interest in the land due to the location of his mining claims "on ground previously segregated from entry by the SHO#4 mineral patent application and publication thereof" (Answer at 6). This assertion simply repeats the basis on which BLM held appellant's claims to be null and void, raising the same issue of correctness that Burnham raises by appealing BLM's decision. American Colloid also argues that because appellant's claims were not located until after the conclusion of the adverse proceedings brought in Federal district court pursuant to 30 U.S.C. §§ 29 and 30 (1982), Burnham is conclusively presumed to have no interest by virtue of his location. This assertion is also substantive, raising an issue as to whether the statutes providing for adversary proceedings preclude the subsequent location of mining claims.

Because American Colloid's arguments as to standing raise substantive issues which are related to the other issues on appeal, we shall begin with them. After reviewing the substantive foundation upon which the company argues that appellant lacks standing to appeal, we will be better able to consider the procedural issue and the manner in which it arises under the mining laws. Because we conclude that appellant may prosecute his present appeal, we will next review the grounds on which BLM dismissed his protest.

Because BLM's decision was based on advice given in the Solicitor's memorandum which was enclosed with the decision, we will also discuss the memorandum in relation to the issues raised by BLM's decision.

II.

In declaring appellant's mining claims null and void, BLM stated: "It has been held that land in a patent application is segregated from entry." No authority was cited for this proposition. In reaching its conclusion, BLM followed the advice of the Regional Solicitor's Office. The Solicitor's memorandum to BLM advised the agency that "the claims are null and void from the beginning, as the land in the patent application is segregated from entry" (Memorandum at 7). The memorandum subsequently repeated this advice citing Belk v. Meagher, 104 U.S. 279, 284-86 (1881). 2/ In adopting this proposition as part of its argument as to standing, American Colloid cites Belk, BLM's decision, and a portion of appellant's statement of reasons discussing the validity of mineral locations on withdrawn lands.

Nothing in Belk supports the rule. The Supreme Court's opinion answers four sequential questions. Id. at 281. The Court first finds that the original locators, by renewing work on their claim in June 1875, held exclusive rights of possession and enjoyment of the ground at issue through

2/ BLM's decision stated: "Thus, the Foxx Nos. 1 thru 18 placer mining claims would be null and void ab initio (from the beginning) as never having any legal effect; 'claims are null and void in any event for location on land segregated from entry.' Belk vs. Meagher, 104 U.S. 279, 284-86 (1881)." The language quoted by BLM appears in the Solicitor's memorandum, not the case cited.

December 31, 1876. Id. at 283. The Court next concludes that when Belk located his claim on December 19, 1876, it was invalid since "a relocation on lands actually covered at the time by another valid and subsisting location is void; and this not only against the prior locator, but all the world, because the law allows no such thing to be done." Id. at 284. The third question was whether Belk's invalid location became operative when the original location lapsed on January 1, 1877. The Court concluded it did not:

> A location is not made by taking possession alone, but by working on the ground, recording and doing whatever else is required for that purpose by the acts of Congress and the local laws and regulations. As in this case, all these things were done when the law did not allow it; they are as if they had never been done. On the 19th of December the right to the possession of this property was just as much withdrawn from the public domain as the fee is by a valid grant from the United States under the authority of law, or the possession by a valid and subsisting homestead or pre-emption entry. [Emphasis supplied.]

Id. at 284-85.

The language quoted from Belk clearly indicates that if American Colloid held valid claims at the time of appellant's locations, his claims are necessarily invalid. 3/ As stated by the Court, a valid location effectively withdraws land from the location of rival mining claims, segregating

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3/ In Lavagnino v. Uhlig, 198 U.S. 443 (1905), the Supreme Court found that a mining claim by a junior locator succeeded to a senior claim forfeited by failure to perform assessment work so that the junior prevailed over a third location made after the forfeiture. Although the decision concerned overlapping locations rather than mining claims covering identical ground, the finding implied that a subsequent location of the same land is not invalid but merely second in priority. The Court reached its conclusion based on an interpretation of 30 U.S.C. § 30 (1982) which found that under the statute a junior locator who applied for patent would benefit from the assumption required by the statute if the senior locator did not adverse and thereby

it from the acquisition of competing rights. See also St. Louis Mining & Milling Co. v. Montana Mining Co., 171 U.S. 650, 655 (1898); Gwillim v. Donnellan, 115 U.S. 45, 49 (1885). This principle, however, is far different from that stated in the Solicitor's memorandum, adopted by BLM in its decision, and cited by American Colloid. The Court in Belk is not concerned with the effect of an application for patent, an issue most likely to arise in Departmental rather than judicial proceedings.

[1] Our review of Departmental decisions has found only one instance supporting the assertion that a mineral patent application segregates land. In 1895 Secretary Smith announced a prospective rule that "a mineral application, properly filed and duly followed by notice thereof by publication and posting, as required by Sec. 2325 (R.S.U.S.) is per se a segregation of the land covered thereby * * *." Andrew J. Gibson, 21 L.D. 219 (1895).

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fn. 3 (continued)
receive patent to the ground. Id. at 455-56. The decision presented considerable difficulty to courts analyzing the legal status of conflicting locations. See Bergquist v. West Virginia-Wyoming Copper Co., 18 Wyo. 234, 106 P. 673, 682-84 (1910) (discussion of decisions). One such case was appealed to the Court and it retreated from its decision in Lavagnino, qualifying that decision on the basis that a claim may be abandoned before it becomes forfeited. Farrell v. Lockhart, 210 U.S. 142, 147 (1908), rev'g 31 Utah 155, 86 P. 1077 (1906). In Swanson v. Sears, 224 U.S. 180 (1912), the Court reached a conclusion contrary to Lavagnino, apparently overruling that decision. See 2 Lindley on Mines, § 339 (3d ed. 1914). Whatever the status of Lavagnino, the issue remains a serious difficulty in mining law. As a matter of principle, the rule stated in Belk controls and a location made over a prior valid claim is necessarily invalid; yet, under the mineral patenting procedures, it remains possible for a junior locator to obtain a patent if the senior does not adverse. See Bowen v. Chemi-Cote Perlite Corp., 102 Ariz. 423, 432 P.2d 435 (1967).

Whether this instruction was ever implemented by local offices is not clear as no subsequent decision has been found applying the rule, but for the case before us. In 1914, in Bay City Oil Co. v. Alvarado Oil Co., 43 L.D. 397 (1914), a patent application for oil placer claims had been rejected for lack of a discovery prior to the date of the application. On appeal it was argued that a subsequent discovery would validate the location if no adverse rights had attached and that, citing Gibson, adverse rights could not attach because the land was segregated. Id. at 398. The Department's opinion did not directly address this argument, deeming only the matter of discovery to be relevant. Finding there had been no discovery, and therefore no valid location when the patent application was filed, the Department concluded that the posted and published notices of the application for patent "were without force and effect" and that "[t]he rights of possible adverse claimants were not affected or concluded by such ineffectual proceedings * * *." Id. at 400.

The implicit rejection of the Gibson instruction in Bay City points to one of several problems such a principle entails. As established by Belk, it is undisputably the law that a valid mining claim segregates the area it encompasses from the acquisition of competing rights. To attribute the same effect to a patent application would permit an invalid location to have the same effect as a valid location. By staking and recording mining claims and then filing an application for patent, a locator could tie up large portions of the public domain without the necessity of making a discovery or even diligently searching for one. A valid location does not need a rule giving

segregative effect to a patent application to defeat rival locations and an invalid claim does not deserve such protection.

Apart from practical considerations, allowing invalid locations to segregate land would also be inconsistent with two provisions of the mining laws. First, the statutory language that "locators of all mining locations made on any mineral vein, lode, or ledge, situated on the public domain * * * shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations," 30 U.S.C. § 26 (1982), would be violated if exclusive rights of possession were recognized for those who had not made a mineral discovery. Cf. Belk v. Meagher, supra at 284 ("[t]he right to the possession comes only from a valid location"). Additionally, as recognized by the Secretary in Gibson, any segregative effect attributed to a patent application could not be absolute. The mining laws permit the relocation of a mining claim by a rival locator when a claim has been abandoned by failure to perform annual assessment work. 30 U.S.C. § 28 (1982). The paper record of a patent application could not defeat this statutory right. 4/ The possibility of a claim being relocated is not foreclosed until the patent application has been approved, the purchase price paid, and a receipt issued, thereby resulting in issuance of a Final Certificate of mineral entry. Benson Mining & Smelting Co. v. Alta Mining & Smelting Co.,

4/ The suggestion made by the Secretary in Gibson that a relocator first establish abandonment of the prior location before locating his own would be contrary to the view subsequently expressed by the Supreme Court in Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co., 171 U.S. 55, 77 (1898).

145 U.S. 428, 430, 434 (1892); 43 CFR 3851.5. With issuance of a Final Certificate of mineral entry, the land encompassed by the mining claim is segregated from the location of other claims and may not be located by another. Union Oil Company of California, 65 I.D. 245, 253 (1958); McCormack v. Night Hawk & Nightingale Gold Mining Co., 29 L.D. 373, 377 (1899); Leary v. Manuel, 12. L.D. 345 (1891); F. P. Harrison, 2 L.D. 767 (1882).

Accordingly, we find BLM erred in ruling appellant's Foxx mining claims to be null and void due to their location on land segregated by a patent application. 5/ For the same reason, we reject American Colloid's first argument as to appellant's standing to appeal.

American Colloid's second argument as to appellant's standing to appeal is that the adverse proceedings in Federal district court initiated under 30 U.S.C. §§ 29 and 30 (1982) precluded appellant from locating his claims (Answer at 3). This argument is similar to the company's first argument, but places the time of segregation sometime after publication of notice of American Colloid's patent application. To the extent this argument is similar, it must be rejected as both potentially giving improper effect to invalid claims and precluding exercise of the statutory right to relocate abandoned claims. Nor is appellant's argument supported by the statutes calling for adverse proceedings.

5/ In finding all 18 of appellant's claims null and void, BLM's decision also goes beyond the record on appeal. The record contains the documents for American Colloid's patent application and shows that appellant's Foxx No. 18 was located on the same land as the company's Sho #4. Nothing in the case file indicates that the company has applied for patent for any other of its claims. Thus, there is no indication that other of appellant's claims conflict with any claim contained in a patent application.

Under the procedures established by 30 U.S.C. § 29 (1982), after an application for patent has been filed and an initial review made by BLM, the agency will direct publication of notice of the application pursuant to arrangements made by the applicant and approved by BLM. See generally 2 American Law of Mining § 51.06[5] (2nd ed. 1984). The notice is published for a period of 60 days and the statute requires that adverse claims be filed during this time. See id. § 52.02[3]. The statute additionally provides:

> If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent * * * and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter.

R.S. 2325; 30 U.S.C. § 29 (1982). 6/ A companion statute then requires that when an adverse claim has been filed with the Department during the period of publication, all proceedings by the Department on the patent application "shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived." 30 U.S.C. § 30 (1982). The adverse claimant is required to commence judicial proceedings "to determine the question of the right of possession" within 30 days after filing his adverse claim with the Department, and he must prosecute

6/ The original reference in the Mining Law of 1872 was to "this act." Act of May 10, 1872, ch. 152, 17 Stat. 91, 93. The reference was changed in the Revised Statutes of 1875 to "this chapter." R.S. 2325. See United States v. Bowen, 100 U.S. 508, 513 (1879). The United States Code lists the specific statutes originally found in Title XXXII, Chapter 6, of the Revised Statutes.

his suit with reasonable diligence or be deemed to have waived his suit. Id. The statute also provides that:

> After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment roll with the register of the land office, * * * and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess.

On their face, the statutes seem to provide a simple and efficient procedure for resolving conflicts between mineral locators so that patent may be issued. If no adverse claim is filed during the period of publication of notice of a patent application, it is assumed "that the applicant is entitled to a patent * * * and that no adverse claim exists." If an adverse claim is filed, patent proceedings within the Department are stayed. If the adverse claim is not pursued in court and diligently prosecuted, it is deemed waived. If prosecuted to completion, the successful party may go to the Department with the judgment "and a patent shall issue."

While the prohibitions expressed in the statutes are sometimes said to be absolute, their application is a matter of interpretation rather than strict construction. By its terms, the portion of 30 U.S.C. § 29 (1982) requiring the assumption "that no adverse claim exists" addresses only the situation in which no adverse claim is filed against a patent application. Similarly, the portion of 30 U.S.C. § 30 (1982) providing for the waiver of an adverse claim refers only to a locator who files an adverse claim but

fails to either timely commence judicial proceedings or prosecute them with reasonable diligence. The statutes, however, have never been understood to apply in only these circumstances, but rather to be the relevant provisions for all situations arising with patenting proceedings. Likewise, the provision that upon presentation of a judgment to the Department "a patent shall issue" does not preclude Departmental review of the validity of a claim. Clipper Mining Co. v. Eli Mining & Land Co., 194 U.S. 220, 224 (1904).

[2] The portion of the statute requiring an assumption "that no adverse claim exists" was addressed by the Department in a series of cases in which, after adverse proceedings had been concluded, the judgment was not immediately filed with the Department and entry was not obtained until sometime later. Subsequent to the entry, protests were filed alleging there had been an abandonment by failure to perform annual assessment work and subsequent relocation of the ground by the protestant. The first such case was Cain v. Addenda Mining Company (On Review), 29 L.D. 62 (1899). A patent application had been made for the Addenda claim in 1879, and adverse proceedings were completed in 1882 with judgment in favor of the adverse claimant for a portion of the ground. No action was taken to patent the remainder of the claim until 1894 when the company obtained entry. In 1895, a protest was filed based on a judgment obtained in a quiet title suit instigated prior to the entry. Based on language appearing in Gillis v. Downey, 85 F. 483, 489 (8th Cir. 1898), the Department rejected the notion that 30 U.S.C. §§ 29 and 30 (1982) precluded consideration of the protest, finding instead that

"[t]he mining laws contemplate that proceedings under an application for patent should be prosecuted to completion within a reasonable time after the required publication, or after the termination of proceedings on adverse claims, if any are filed * * *." Cain v. Addenda Mining Company (On Review), supra at 66. This rule was deemed necessary because otherwise, by simply posting notice of a patent application a locator could "project indefinitely into the future" the assumption that no adverse claim exists, contrary to the statute requiring performance of assessment work. Id. Subsequently, in P. Wolenberg, 29 L.D. 302 (1899), (On Review), 29 L.D. 488 (1900), a more formal rule was adopted:

> The assumption, declared in section 2325 of the Revised Statutes, that no adverse claim exists in those instances where no adverse claim is filed in the local office during the period of publication, relates to the time of the expiration of the period of publication and to adverse claims which might have been made known at the local office before that time. It has nothing to do with adverse claims which are initiated subsequent to that time and which could not therefore have been made known at the local office during the period of publication.

P. Wolenberg, supra at 305. These rules were applied by the Department in numerous cases. See Lucky Find Placer Claim, 32 L.D. 200 (1903), and cases cited therein. See also Sweeney v. Wilson, 10 L.D. 157 (1890); Little Pauline v. Leadville Lode, 7 L.D. 506 (1888).

The same understanding of the statute was adopted by the Supreme Court in Enterprise Mining Co. v. Rico-Aspen Consolidated Mining Co., 167 U.S. 108 (1897). At issue was ownership of ore within the overlap of the Vestal and

Jumbo No. 2 lode claims. The first issue was seniority of location. Although the Vestal had been located first, the Jumbo No. 2 was located following discovery of a vein in a tunnel site which had been commenced a number of months prior to the location of the Vestal. The Court held that the right to the vein in the Jumbo No. 2 related back to the date of location of the tunnel site. Id. at 113. The second issue was whether the failure to adverse a patent application for the Vestal claim limited the rights of the owner of the Jumbo No. 2. The fact complicating the issue was that no discovery had been made in the tunnel prior to or during the period of publication when an adverse claim was required to be filed. The Court concluded:

> [A]s the defendant could not, in any suit which it might institute, establish a certain adverse right, and as litigation in the courts is based upon facts and not upon possibilities, it seems to us that nothing was to be gained by instituting adverse proceedings, and, therefore, nothing lost by a failure so to do.

Id. at 116. See also Enterprises Mining Co. v. Rico-Aspen Consolidated Mining Co., 66 F. 200, 208-10 (8th Cir. 1895). Other courts have similarly found the statute not to apply to subsequent locations. Poore v. Kaufman, 44 Mont. 248, 119 P. 785 (1911); Champion Mining Co. v. Consolidated Wyoming Gold Mining Co., 75 Cal. 78, 16 P. 513, 514-15 (1888).

[3] The fundamental error of American Colloid's argument is to confuse the language of the statute with the effect it may have in a given case. Similar to service by publication, posting and publishing notice of a patent application alerts all who may hold an interest in the land applied for that

they should take steps to protect their interests. If they do, the statute designates the courts as the proper forum for resolving disputes as to the right of possession. If they do not, the Department may proceed to determine whether the applicant is entitled to a patent. The statute requires an assumption by the Department that no adverse claim exists. This assumption operates to effect a presumption that the patent applicant holds superior possessory title so that the Department may proceed to determine the question of whether his mining claim is valid under the mining laws. 7/ Rival locators may still have competing claims, and one may be superior in title, 8/ but their claims are of no concern to the Department. If rival locators wish to pursue their claims, they must find a forum elsewhere. 9/ If the Department determines that the applicant's claim is valid and issues a patent, a rival claim becomes a nullity because there is no longer any Federal land to which it can attach as a location under the mining laws.

7/ A problem can arise when two patent applications for the same land are before the Department. A number of early Departmental decisions held that acceptance of a patent application precluded acceptance of a second application for the same land, although when the matter was raised by a third party it was frequently determined that the irregularity of accepting a second application could be waived by the Department. See International Asbestos Mills & Power Co., 45 L.D. 158, 161 (1916), and cases cited therein; Stemmons v. Hess, 32 L.D. 220 (1903); Rocky Lode, 15 L.D. 571 (1892); Hall v. Street, 3 L.D. 40 (1884); Rebellion Mining Co., 1 L.D. 542 (1881). Although not recently applied, the rule appears to have continued in effect. See Union Oil Company of California, supra, at 253. We note that in the present case there appears to have been a patent application pending for some of the claims included in American Colloid's application which was the subject of appellant's protest.

8/ See note 3, supra.

9/ Whether and when a court has jurisdiction to consider such a claim is, of course, to be determined by the courts. The point of the decision in Wight v. Dubois, 21 F. 693 (C.C.D. Colo. 1884), would seem to be that a locator who fails to adverse cannot pursue his claim in court. See Neilson v. Champagne Mining & Milling Co., 119 F. 123 (8th Cir. 1902). However, Poore v. Kaufman, supra, understood Wight to permit such suits. See also, Bowen v. Chemi-Cote Perlite Corp., supra.

However, if for any reason the patent application is rejected, matters are restored to where they stood prior to the application, and a rival locator may adverse a second application for the land or apply for patent himself. Thus, while the result of a locator's failure to adverse is that his claim becomes nullified when patent is issued, this effect is a result of the issuance of the patent, not the assumption that no adverse claim exists as required by 30 U.S.C. § 29 (1982). That assumption concerns Departmental review of patent applications, not the validity of mining locations whether made prior to or after the date of the patent application, publication of notice, or any adverse proceedings resulting from it.

In the present case, appellant located his Foxx claims after notice was posted and published and the adverse suit concluded. It is not reasonable to say that he received notice to defend an interest which did not exist at the time an adverse claim could have been filed. Nor is there any need to apply the assumption to an interest arising subsequent to the period of publication of notice. In reviewing American Colloid's patent application, BLM is still required to regard the company has having superior possessory title. There is no legal basis on which appellant's subsequently located claims can affect BLM's conclusions as to the validity of the company's locations. However, there is nothing about the statute which requires a conclusion that appellant's claims are invalid or makes them invalid due to their location subsequent to the period of publication of notice of the company's patent application. See Poore v. Kaufman, supra; cf. Norris v. United Mineral Products Co., 61 Wyo. 386, 158 P.2d 679, 684 (1945) (quiet title action did not bar

locations). Accordingly, we reject American Colloid's second argument that under 30 U.S.C. §§ 29 and 30 (1982) publication of notice of its patent application and the adverse proceedings barred appellant's locations.

Our conclusions about the language of the statute and its effect do not bestow any legitimacy upon appellant's claims which they do not have by virtue of their location under the mining laws. We find only that they are not invalid due to their location subsequent to the adverse proceedings between American Colloid and other locators of the land. As previously stated, whether the claims could properly be located depends, among other matters, upon whether the land was available for their location. See Belk v. Meagher, supra. It also does not follow from our conclusion about the effect of the statute that, following the location of his claims, appellant would have been entitled to file an adverse claim with the Department or that he is now entitled to bring one. See Healey v. Rupp, 37 Colo. 25, 86 P. 1015 (1906). The statute provides for adverse claims to be filed only "during the period of publication" and makes no provision for their submission at any other time. 30 U.S.C. § 30 (1982).

III.

[4] The course of action open to Burnham was the one he took. He was entitled to object to American Colloid's patent application on the grounds that the company failed to comply with the terms of the mining laws. 30 U.S.C. § 29 (1982); United States v. Grosso, 53 I.D. 115, 120-21 (1930).

The mechanism which has long been provided by the Department for bringing such allegations to its attention, filing a protest, is that taken by Burnham in the present case. "[A]ny objection raised by any person to any action proposed to be taken in any proceeding before the Bureau will be deemed to be a protest and such action thereon will be taken as is deemed to be appropriate in the circumstances." 43 CFR 4.450-2. Burnham filed his protest and has now appealed its dismissal to this Board. Whether he has standing to appeal is an issue which was properly raised by American Colloid and to which we now turn.

[5] As with other matters, the right to appeal to the Board from the denial of a protest is governed by 43 CFR 4.410(a). The right is more restricted than the right to file a protest. The parties properly argue that the leading decision describing the qualifications for standing incorporated into the regulation is In Re Pacific Coast Molybdenum Co., 68 IBLA 325 (1982). As stated there and frequently repeated since, under the regulation there are two separate and distinct prerequisites to prosecution of an appeal: (1) the appellant must be a "party to the case," and (2) the appellant must be "adversely affected" by the decision below. Id. at 331. Denial of a protest makes an individual a party to a case, but such a denial does not necessarily establish that the party will be adversely affected. Id.

In order to be adversely affected, a protestant must have an "interest" in the land which is the subject of the protested action. The "interest" necessary for standing to appeal is not the same as the "interest"

necessary to bring a contest. A contest requires "title to or an interest in land," which generally must be grounded on a statutory grant. Alaska v. Sarakovikoff, 50 IBLA 284, 287 (1980); United States v. United States Pumice Co., 37 IBLA 153, 158-59 (1978). In contrast, the interest necessary to appeal denial of a protest is neither limited to legal interests in the specific land at issue, In Re Pacific Coast Molybdenum Co., supra at 331, nor limited to economic or property rights, Sharon Long, 83 IBLA 304, 308 (1984). It must be a legally recognizable interest, but ownership of adjoining land or past usage of the land in dispute have been recognized as giving sufficient interest. Id. Although judicial standing and administrative standing do not turn on the same considerations, the Board has found court cases discussing judicial standing to be useful guides to the types of interests which are properly considered in adjudicating administrative appeals. Id.; In Re Pacific Coast Molybdenum Co., supra at 332. Cf. State of Alaska, 41 IBLA 315, 324-27, 86 I.D. 361, 365-67 (discussing and applying Koniag, Inc. v. Andrus, 580 F.2d 601 (D.C. Cir.), cert. denied, 439 U.S. 1052 (1978)).

[6] Whether a mining claim constitutes a sufficient interest on which to base standing to appeal is not in issue. Rather, the question is whether the assumption "that no adverse claim exists" extends to preclude consideration of appellant's claims as an interest on which to base standing to appeal. In a sense, we have already answered this question. In that the assumption required by the statute pertains to Departmental review of patent applications and does not operate to invalidate mining claims, we cannot say

appellant's claim is invalid. As a mining claim, it is sufficient to give standing to appeal. This conclusion is also required by early Departmental cases addressing standing to appeal the dismissal of protests.

The rule that a party without an interest is not entitled to an appeal to the Secretary has long been followed by the Department. See Santa Rita Mines, 1 L.D. 579 (1883) (rev. ed. 1887); Cedar Hill Mining Co., 1 L.D. 628 (1881) (rev. ed. 1887). At the time, protestants were considered to be parties without an interest and therefore not entitled to an appeal; nevertheless, their appeals were reviewed under Departmental rules of practice. See Cedar Hill Mining Co., supra. Whatever the formal status of mining claimants who had failed to adverse, hearings were frequently held to allow them to support their allegations and their appeals were commonly reviewed. See Wight v. Tabor, 2 L.D. 738, (On Review), 2 L.D. 743 (1884); Branagan v. Dulaney, 2 L.D. 744, 749 (1884).

One reason for the apparently incongruous treatment of appeals in the early cases seems to be that no distinction was made between protestants who had no interest in the land in dispute and those who did. The first case clearly addressing "whether in any case a protestant may be entitled to the right of appeal" was Bright v. Elkhorn Mining Co., 8 L.D. 122 (1889). Following a hearing and dismissal of a protest, the General Land Office declined to transmit the protestant's appeal to the Secretary on the grounds that there was no right of appeal. The Secretary agreed that a person "who stands solely in the relation of amicus curiae, and who alleges no interest in the result of the application, cannot question the judgment of the land office

in passing upon said application and protest, and is not entitled to the right of appeal from such decision."

Id. However, he found that a different result was required when

> a protestant shows possession of an interest, either present or prospective, * * * and shows that the claimant has failed to comply with the terms of the statute * * * whereby the limitation of the statute ought not to operate against the protestant, he is entitled to the right of appeal upon said protest, although no adverse claim was filed within the period prescribed by the statute.

Id. at 123. Accordingly, the opinion concluded:

> [A] protestant who alleges an interest adverse to a mining claimant, and further alleges a failure on the part of said claimant to comply with the mining laws, is not a mere friend of the court, but a protestant, acting in his own interest, and asking the judgment of the Department upon the question raised by his protest, that the mineral claimant may be required to comply with the law, and thus enable the protestant to assert his claim in the proper tribunal. A protestant of this character is entitled to the right of appeal.

Id. at 126.

The rule established in Bright became the governing standard and was consistently followed in numerous cases without regard to the time of location of the asserted conflicting claim. See Rupp v. Heirs of Healey, 38 L.D. 387, 391-92 (1910); Opie v. Auburn Gold Mining & Milling Co., 29 L.D. 230, 231 (1899) ("appeal as a matter of right"); Parsons v. Ellis, 23 L.D. 69 (1896); Aspen Consolidated Mining Co., 22 L.D. 8 (1896); Smuggler Mining Co.

v. Trueworthy Lode Claim, 19 L.D. 356 (1894); Nevada Lode, 16 L.D. 532, 533-34 (1893); Weinstein v. Granite Mountain Mining Co., 14 L.D. 68, 70 (1892). See also Gray v. Milner Corp., 64 I.D. 337, 341 (1957). It is important to note that while the rule permits standing to appeal dismissal of a protest, it does not permit the adverse claim to be asserted or considered as the basis for substantive argument as to the invalidity of the claim in the protested patent application. See 43 CFR 3872.1. For example, a protestant cannot argue that the applicant's location was invalid because the discovery was made in the protestant's prior location. Langwith v. Nevada Mining Co., 49 L.D. 629, 633 (1923); Mutual Mining & Milling Co. v. Currency Co., 27 L.D. 191, 193 (1898). See Chemi-Cote Perlite Corp. v. Bowen, 72 I.D. 403, 407 (1965).

American Colloid argues that Wight v. Dubois, 21 F. 693 (C.C.D. Colo. 1884), precludes recognition of appellant's standing to appeal. The relevant passage is the statement: "Such a protest can be made only before the land department, and, if there rejected, the protestant has no further standing to be heard anywhere." Id. at 696. It is clear that the sentence is not a comment on standing within the Department; nor could a court limit Departmental standing. We see no conflict between Justice Brewer's understanding of the statutes and our own. His opinion clearly states that a locator who fails to adverse may bring a protest within the Department, though he may not assert his own title or rights as the basis for the protest. His only hope is that "if the protest or objection is sustained, the proceedings will

be set aside, new ones must be commenced, and then the objector may be in a position to assert his rights * * *." Id. Thus, the opinion contemplates the same possible outcome to a protest as has long been recognized by the Department. See Branagan v. Dulaney, supra at 752. The case is also in accord with the conclusion reached above that the statute requires a factual assumption in reviewing a patent application and does not render claims void per se. For this reason, we reject the advice based on Wight given BLM in the Solicitor's memorandum that "[e]ven if a protestant succeeded in preventing the issuance of patent, his claims would be null and void for his lack of title which would be conclusively presumed due to his failure to file an adverse claim when he had the opportunity" (Solicitor's Memorandum at 7, emphasis in original). We also conclude that the appellant has standing to appeal the dismissal of his protest.

IV.

We turn next to the issues raised by BLM's decision dismissing appellant's protest. As previously quoted, BLM concluded that the issue of prestaking was a matter related to the good faith of a locator and his possessory rights which had been disposed of by Judge Brimmer's decision. Consequently, it found that the documents submitted by appellant provided no evidence not considered by the court and dismissed the protest for failure to show that American Colloid had not complied with the law. BLM's conclusions followed advice given in the Solicitor's memorandum which was enclosed with the decision. BLM's decision raises issues as to whether prestaking (and pre-revocation exploratory drilling) concerns solely the good faith and

possessory rights of a locator, whether issues of good faith are solely matters which concern rival locators involved in judicial proceedings for possession of mining claims, and whether the litigation of the adverse claims disposed of the issue of prestaking as to American Colloid's claims. Because BLM's conclusions were drawn from the Solicitor's memorandum, the issues are best approached by reviewing the conclusions stated there.

Prior to answering the specific questions asked by BLM, the memorandum states what purports to be a general description of the relevant law. Only a few points need be mentioned. First, the memorandum states that under the mining laws "[s]ome things are made requirements of federal law, e.g., discovery, while other things are made requirements of state law, e.g., possession" (Memorandum at 2). Second, the memorandum states: "Possession of mining claims is considered a matter of state law; i.e., within the jurisdiction of state courts or federal courts applying state law." Id. at 3. Third, the memorandum concludes that: "As to those matters going mostly to possession, such as compliance with state requirements for staking and especially matters of good faith, the Department always accepts the judgment and should, unless it would have some very cogent reason to do otherwise." Id. at 4. As to the allegation of the protest that the Department should not issue a patent due to prestaking of the claims, the memorandum advises BLM: "You should reject that reason as one already dealt with and determined by the court and one which goes almost exclusively to possession -- that is, a matter for state law." Id. This advice is repeated several times in varying forms. For instance, after stating that "no harm has been done to

any federal interest by the so-called prestaking," the memorandum explains this by stating that the issue of prestaking "goes entirely to the issue of possession, as it concerns the claimants' good faith (or bona fides)," and that for this reason "the application of state law as to possession should be taken as conclusive in this case." Id. at 5. No authority is cited in the memorandum for the analysis presented.

The Mining Law of 1872, Act of May 10, 1872, ch. 152, 17 Stat. 91, 30 U.S.C. §§ 22-24, 26-28, 29-30, 33-35, 37, 39-42, and 47 (1982), establishes the relation between state and Federal laws governing the location of mining claims. It first provides that

> all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase * * * under regulations prescribed by law, and according to the local customs or rules of miners in the several districts, so far as the same are applicable and not inconsistent with the laws of the United States.

30 U.S.C. § 22 (1982). Similarly, the statute governing the location of lode claims provides that such claims may be located "so long as they comply with the laws of the United States, and with State, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title." 30 U.S.C. § 26 (1982). The statute for placer claims provides that they "shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided

for vein or lode claims." 30 U.S.C. § 35 (1982); see Clipper Mining Co. v. Eli Mining & Land Co., supra at 222. Subject to specific stated requirements, mining districts are explicitly authorized to "make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim * * *." 30 U.S.C. § 28 (1982).

As a practical matter, local customs and the rules of mining districts have now been replaced by state laws. See American Law of Mining § 33.01[4] (2d ed. 1984). The statutory provisions nevertheless apply to preclude states from establishing location requirements contrary to Federal law, as would the supremacy and property clauses, Art. IV, § 3, cl. 2; Art. VI, cl. 2. See 2 American Law of Mining § 33.01[2] (2d ed. 1984).

While the statutory provisions permit states to set requirements for locating mining claims on Federal lands, they do not distinguish between matters governed by Federal law and matters governed by state law. Rather, the Federal statutes establish basic requirements governing the location of mining claims and permit them to be supplemented by local laws which are not inconsistent with Federal law. See Butte City Water Co. v. Baker, 196 U.S. 119 (1905). The difference is important. It means that a valid mining claim is not the result of complying with either Federal or state law, but complying with an intermixture of state and Federal laws. See, e.g., Roberts v. Morton, 389 F. Supp. 87, 94 (D. Colo. 1975), aff'd, 549 F.2d 158 (10th Cir. 1976), cert. denied, 434 U.S. 834 (1977), aff'g United States v. Zweifel,

11 IBLA 53, 80 I.D. 323 (1973). This feature of mining law is explicitly stated in 30 U.S.C. § 26 (1982) in regard to "the exclusive right of possession and enjoyment" provided by that statute.

The interrelation of state and Federal location requirements is easily illustrated. State statutes commonly specify the contents of recorded location notices, see, e.g., Wyo. Stat. §§ 30-1-101, 30-1-110 (Supp. 1983), but regardless of whether required by state law, the record must contain "the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim." 30 U.S.C. § 28 (1982); see Deeney v. Mineral Creek Milling Co., 11 N.M. 279, 67 P. 724 (1902). Similarly, whatever requirements a state may impose as to the manner for marking a claim's boundaries, it "must be distinctly marked on the ground so that its boundaries can be readily traced," 30 U.S.C. § 28 (1982), and placer claims located on surveyed lands must "conform to the legal subdivisions of the public lands." 30 U.S.C. § 35 (1982); see Charlton v. Kelly, 156 F. 433, 435 (9th Cir. 1907); Parker v. Jones, 281 Or. 3, 572 P.2d 1034 (1978).

[7] A consequence of the interrelation of Federal and state requirements for establishing mining claims is that judicial proceedings between locators may raise a variety of issues under state or Federal law or both. Determinations as to "the right of possession" are, of course, solely for decision by local courts, 30 U.S.C. § 30 (1982), but the assignment of possessory disputes to local courts does not mean that they are resolved

solely on the basis of state law. See Shoshone Mining Co. v. Rutter, 177 U.S. 505 (1900). A dispute may turn on a simple factual issue such as priority or sufficiency of discovery. See, e.g., Johanson v. White, 160 F. 901 (9th Cir. 1908); Granlick v. Johnston, 29 Wyo. 849, 213 P. 98 (1923). A dispute may also raise a mixture of factual and legal issues entailing questions as to priority and validity of mining claims under both state and Federal law. See, e.g., White v. Ames Mining Co., 82 Idaho 71, 349 P.2d 550 (1960); Dripps v. Allison's Mines Co., 45 Cal. App. 95, 187 P. 448 (1919). The intermixture of location requirements may even require an interpretation of the relation of local and Federal requirements. See, e.g., Norris v. United Mineral Products, supra at 689; Wagner v. Holland, 10 Alaska 40 (1941). It may also be that, due to the failure of the complainant to sustain the validity of his location, judgment is issued without reaching the validity of the defendant's claims. See, e.g., Ledoux v. Forester, 94 F. 600 (C.C.D. Wash. 1899). In any event, the issue of the validity of a mining claim is also the ultimate concern of the Department when a patent application has been made, and it necessarily has the power to inquire into and determine whether the location is valid under both Federal and state law. Cameron v. United States, 252 U.S. 450, 460, 463-64 (1920); Steel v. Smelting Co., 106 U.S. 447, 451 (1882); Work Mining & Milling Co. v. Doctor Jack Pot Mining Co., 194 F. 620, 625 (8th Cir. 1912). See J. B. Nichols & Cy Smith (On Rehearing), 46 L.D. 20 (1917) (reaffirming H. H. Yard, 38 L.D. 59 (1909)).

Because judicial proceedings between locators may raise a variety of issues bearing upon the validity of mining claims and the Department must also determine the validity of a claim, questions can arise as to the

effect judicial proceedings have upon Departmental review. The statute provides that upon filing a certified copy of the judgment with the Department, "a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess." 30 U.S.C. § 30 (1982).

Language appearing in some early decisions tends to equate the determination as to possessory rights made in adverse proceedings with entitlement to a patent. See, e.g., Wolverton v. Nichols, 119 U.S. 485, 490 (1886); Burke v. Bunker Hill & S. Mining & Concentrating Co., 46 F. 644 (C.C.D. Idaho 1891). It was subsequently recognized, however, "that it is 'the question of the right of possession' which is to be determined by the courts, and that the United States is not a party to the proceedings." Perego v. Dodge, 163 U.S. 160, 168 (1896). In Clipper Mining Co. v. Eli Mining & Land Co., supra at 232-34, the Supreme Court stated in the context of a case concerning lodes in placers:

> We must not be understood to hold that, because of the judgment in this adverse suit in favor of the placer claimants, their right to a patent for the land is settled beyond the reach of inquiry by the government, or that the judgment necessarily gives them the lodes in controversy. * * *
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> * * * * * * *
>
> * * * The land office may yet decide against the validity of the lode locations and deny all claims of the locators thereto. So also it may decide against the placer location and set it aside, and in that event all rights resting upon such location will fall with it.

See also Doe v. Waterloo Mining Co., 70 F. 455, 462 (9th Cir. 1895); Upton v. Santa Rita Mining Co., 14 N.M. 96, 89 P. 275 (1907).

The Department has long held a similar view. In Alice Placer Mine, 4 L.D. 314, 317 (1886), it was held: "The judgment roll proves the right of possession only. The applicant must still make the proof required by law to entitle him to patent. Branagan et al. v. Dulaney, (2 L.D., 744). The sufficiency of that proof is a matter for the determination of the Land Department." See also United States v. Grosso, supra at 119-21; Clipper Mining Co. v. Eli Mining & Land Company (On Review), 34 L.D. 401 (1906); Apple Blossom Placer v. Cora Lee Lode, 14 L.D. 641 (1892). The Department's decisions were quoted and approved in Perego v. Dodge, supra, and Clipper Mining Co., supra, effectively rejecting any implication of the earlier decisions that judicial proceedings left nothing to be determined by the Department.

[8] Despite the potential for conflict suggested by the dual authority of courts and the Department to determine the validity of mining claims, few cases have considered the matter except as to specific issues. See, e.g., Estate of Bowen, 14 IBLA 201, 81 I.D. 30 (1974). It is not questioned that the findings of a court as to determinative facts in the proceedings before it may be binding upon the Department. The question, however, is when and to what extent the Department must accept factual issues as having been conclusively settled by a court. The most obvious rule, of course, is that a judgment is not conclusive "as to matters which might have been decided, but only as to matters which were in fact decided." Last Chance Mining Co. v. Tyler Mining Co., 157 U.S. 683, 687 (1895).

During a trial, however, a large volume of evidence may be introduced by the parties in support of various facts they assert to be true, and numerous issues may be raised by the parties. Unless addressed by the court in its written judgment, there may be no basis on which to conclude that a matter was disposed of by the court. Unlike litigation over title to real property, the judgment in a judicial proceeding between locators determines superiority of possessory title. 30 U.S.C. § 30 (1982); Clipper Mining Co. v. Eli Mining & Land Co., supra at 232-34; Perego v. Dodge, supra at 168; Upton v. Santa Rita Mining Co., supra at 278-80; United States v. Grosso, supra. To the extent evidence introduced at trial establishes a fact to be true, a successful litigant may simply provide it to the Department in support of his patent application. When a successful litigant argues that a fact was necessarily found by the court in reaching its judgment, the Department must consider whether such an argument must be true under the mining laws. By their nature, such arguments entail either an inference from the written judgment or an interpretation of it, as well as a conclusion as to the relation of the judgment to the record of the proceedings. The trial record is not before the Department, and it is not the task of the Department to review the judicial record. Unless mandated by the terms of the judgment, there may be no reason to conclude that, in reaching its judgment, the court made any determination as to a fact argued for by a party in introducing evidence.

[9] Turning to the judgment issued by the court in the proceedings in which American Colloid participated, we find that no part of it addresses the issue of prestaking. Rather, it establishes a division of the contested

lands, awarding exclusive possession of some tracts to each of the parties. No portion of the judgment addresses the validity of the claims or makes findings of fact as to the locators' compliance with the mining laws. Thus, we cannot conclude that the judgment of the court was dispositive as to the issue of prestaking. Nor does the probable fact that the parties took the issue into consideration in reaching a settlement, as observed by BLM in its decision, have any relevance. Any effect attributed to a judgment issued in adverse proceedings must rest upon the judicial authority of the court to find facts and rule upon applicable law. The district court's judgment issued as a consequence of a settlement agreed upon by the parties. In reaching a settlement the parties are indeed likely to be influenced by the advice of their attorneys as to the probability of success on the merits, but they may settle for any number of reasons. The terms of the settlement must be reviewed and approved by the court, but if it approves, there is no need to decide the factual and legal issues upon which it otherwise would have based its decision.

With its Answer, American Colloid has submitted a copy of an "Order Denying Motions for Summary Judgment" issued by Judge Brimmer on June 16, 1983, as part of the litigation of the adverse claims. It appears that both sides moved for summary judgment. The basis on which American Colloid argued that the case presented "no genuine issue as to any material fact," Fed. R. Civ. P. 56(c), is not stated in the court's order. It does state that the motion was made "with respect to certain claims of American Colloid using the technique of 'adoption' of already completed discovery and monumentation" (Order at 4). The relevant portion of the order discusses Noonan v.

Caledonia Gold Mining Co., 121 U.S. 393 (1887), and several other cases. Following this discussion, the order states:

> American Collid [sic] purports to have adopted discovery monuments and/or corner posts for various of the disputed claims through the posting of new location notices at exactly 10:00 a.m. on October 10, 1981 and the filing of location certificates with the applicable agencies. Such adoption if done timely could be proper under Noonan. Issues of fact still remain as to whether American Colloid or some other party actually completed location and recorded first. The facts bearing on this question must be elicited at trial.

(Order at 6). Accordingly, the court denied the motion.

We do not believe the quoted paragraph makes any determination as to whether American Colloid properly adopted monuments for its claims. It notes that adoption, as purportedly done by the company, could be proper under Noonan. The court dismissed the motion for summary judgment. Its order makes no finding of fact as to the performance of any act of location, but simply recites that issues of fact remained as to when locations were completed. Absent a finding as to the fact of adoption, it is not possible to conclude that the court found that as a matter of law it was proper for the company to do so in the circumstances presented by the case. The court recognizes that Noonan approves of adoption as a doctrine of mining law and that the case might apply to an adoption made by American Colloid. Without a determination as to the facts, the court's statement cannot be regarded as ruling on the issue of prestaking and adoption or approval of adoption in regard to American Colloid's claims. Otherwise stated, if the parties had gone to trial, it remained possible for the court to rule against the company on the issue.

Accordingly, we find BLM improperly concluded that the documents submitted by appellant could not be considered as to American Colloid's patent application because they had been part of the litigation of the adverse suits leading to the settlement by the parties and the court's judgment. It is also clear that the Solicitor's memorandum improperly advised BLM to reject appellant's argument that American Colloid's claims were invalid because the issue of prestaking had been determined by the court. See 2 American Law of Mining, § 52.03[3] (2d ed. 1984). Equally, the memorandum erred in reaching this conclusion on the basis that possessory disputes are governed by state law. To the extent such disputes raise issues as to the validity of mining claims, either Federal or state law or both may apply.

[10] Nor is the Solicitor's memorandum correct in concluding that good faith relates solely to the issue of possession and therefore state law. Good faith in the location of mining claims has widely been recognized as an implicit requirement of the mining laws. See, e.g., Bagg v. New Jersey Loan Co., 88 Ariz. 182, 354 P.2d 40, 45 (1960). "Good faith," of course, is not a precise term and a finding as to a lack of good faith has been used to condemn a variety of evils. See 1 American Law of Mining, § 31.08 (2d ed. 1984). When the question of good faith concerns a locator's knowledge of prior claims and his purposes in locating rival claims as in Columbia Standard Corp. v. Ranchers Exploration & Development, Inc., 468 F.2d 547 (10th Cir. 1972), the issue of good faith is appropriately left to resolution by judicial proceedings between the locators. See also Ranchers

Exploration & Development Co. v. Anaconda Co., 248 F. Supp. 708, 728-31 (D. Utah 1965). However, good faith may also concern a locator's knowledge and purposes in attempting to obtain rights to Federal lands by establishing mining claims.

Departmental decisions have commonly addressed the issue of good faith in examining whether claims have been located for the purpose of mineral development. See, e.g., United States v. Moorehead, 59 I.D. 192, 194-95 (1946); United States v. Langmade & Mistler, 52 I.D. 700, 704-05 (1929) (millsite); Grand Canyon Railway Co. v. Cameron, 36 L.D. 66 (1907). The authority of the Department to inquire into a locator's good faith in regard to such matters has been noted by the courts. See United States v. Lavenson, 206 F. 755, 765 (W.D. Wash. 1913); cf. United States v. Zweifel, 508 F.2d 1150, 1156 (10th Cir. 1975). On occasion this Board has also recognized that bad faith may serve as the basis for invalidating a claim through administrative proceedings, see In Re Pacific Coast Molybdenum Co., 75 IBLA 16, 35, 90 I.D. 352, 363 (1983); United States v. Dillman, 36 IBLA 358 (1978), and lack of good faith is frequently one of the grounds on which BLM contests mining claims, see, e.g., United States v. Prowell, 52 IBLA 256, 257 (1981). Four months prior to the date of the Solicitor's memorandum under consideration here the Board issued United States v. Zimmers, 81 IBLA 41 (1984), finding mining claims to be invalid on the basis that they had not been located in good faith for the purpose of developing a mining operation.

We therefore reject the fundamental premise of the Solicitor's memorandum that prestaking concerns only the good faith and possessory rights of a locator and can be reviewed only under state law applied by a local court. Because BLM followed the Solicitor's advice in issuing its decision, it erred as to the grounds stated for dismissing appellant's protest. Accordingly, we must reverse its decision and remand the case for further consideration.

V.

In summary, we hold that BLM erred in finding appellant's Foxx mining claims to be null and void. We find that they are not invalid under 30 U.S.C. §§ 29 and 30 (1982) by reason of their location after publication of notice of American Colloid's patent application, and we find that appellant has standing to appeal. In addition, we find that BLM's rejection of appellant's protest is not sustainable on the mere basis of the settlement agreement between American Colloid and other private parties. It is incumbent on the agency to independently decide whether the subject claims satisfy all legal requirements in response to the protest filed, and that has not been done.

Accordingly, on remand BLM is to ascertain the facts as to American Colloid's activities on the land prior to the revocation of the withdrawal as they pertain to the company's location of its mining claims. Thereafter, BLM shall issue a new decision on the protest filed by Scott Burnham disposing of all factual and legal questions raised thereby. If a genuine dispute as

to the facts should arise, the agency may deem it necessary to hold an informal hearing to resolve such dispute. Any party to the case adversely affected by BLM's decision shall have a right of appeal to the Board pursuant to 43 CFR 4.410.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and the case file remanded to BLM. 10/

Franklin D. Arness

Administrative Judge

We concur:

Wm. Philip Horton

Chief Administrative Judge

John H. Kelly

Administrative Judge.

10/ In the proceedings on remand, BLM should keep in mind the possible effect of National Wildlife Federation v. Burford, No. 85-2238 (D.D.C. Feb. 10, 1985), order published 51 FR 5809 (Feb. 18, 1986), (Termination of withdrawals in effect on Jan. 1, 1981, enjoined) upon this appeal. See also Solicitor's memorandum, National Wildlife Federation v. Robert F. Burford, Donald P. Hodel, & United States Department of the Interior (Mar. 10, 1986).